Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MICHAEL HIRANO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether intent to defraud is an essential element of a prosecution for false impersonation of a federal officer or employee under 18 U.S.C. § 912.

2. Whether two separate and distinct offenses derived from the same statute may be charged in one count without that indictment being duplicitous in violation of the Fifth Amendment.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Hirano, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (entered December 28, 1993) is included in the Appendix at 1a-6a. The order of the court of appeals denying rehearing (entered January 24, 1994), is included in the Appendix at 9a. The judgment of the United States District Court for the Eastern District of Virginia is included in the Appendix at 7a-8a.

JURISDICTION

The judgment and opinion of the court of appeals was entered on December 28, 1993, and the petition for re-

hearing was denied on January 24, 1994. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, that—

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .

U.S. Const. amend. V.

Section 912 of Title 18 of the United States Code provides, in pertinent part, that—

> Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency, or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be [guilty of a felony].

STATEMENT OF THE CASE

Petitioner Michael Hirano was indicted in the United States District Court for the Eastern District of Virginia on three counts of impersonating a federal officer or employee in violation of 18 U.S.C. § 912. Section 912 makes it a felony to "assume[] or pretend[]" to be an officer or employee of the United States and, in the alternative, either to (1) "act[] as such"; or (2) demand or obtain any "money, paper, document or thing of value." 18 U.S.C. § 912. Each count of the indictment in this case charged both "distinct crimes," *i.e.*, that petitioner pretended to be a federal employee and both "act[ed] as such" and demanded some "thing of value." App. 4a.

1. The evidence adduced at trial established that on August 1, 1992, petitioner approached Kelly Dodson, a security guard at the George Mason University Law School ("University"). Petitioner stated that he worked for "the agency." In order to verify this, petitioner placed a phone call and handed the phone to Dodson, who heard on the other end of the line "Federal Bureau of Investigation." Petitioner claimed to Dodson that this proved his identity. Petitioner then requested a copy of a police report on Mary Brett, an individual who was petitioner's social acquaintance. This request formed the basis for Count One of the indictment.

On August 4, petitioner approached University security guard, Michael Crawford, and identified himself as a Department of Defense employee. Crawford referred petitioner to Maurice Sobel, a University police officer. Petitioner then spoke to Sobel. During the conversation with Sobel, petitioner requested information regarding Larry Brett, the ex-husband of Mary Brett. This request forms the basis for Count Two.

On August 14, 1992, an individual identifying himself as Sergeant Harris of the United States Air Force called the University security office and spoke with University police officer Sobel. At trial, Sobel testified that the caller who had identified himself as "Harris" was the same individual who Sobel had spoken with on August 4th. During their conversation, the caller requested Mary Brett's home address. This request formed the basis for Count Three.

2. Following a bench trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on all three counts. He was sentenced to four months' imprisonment on each count, with the sentences to run concurrently, and placed on supervised release for a period of one year. Petitioner's subsequent motion for a new trial and motion to re-open the bench

trial for the submission of new evidence both were denied.[1] A timely appeal to the Fourth Circuit followed.[2]

3. In his appeal to the Fourth Circuit, petitioner raised, *inter alia*, the following issues: (1) the insufficiency of the indictment; (2) the duplicity of the indictment because each count charged both of the "distinct crimes" defined in Section 912; and (3) the insufficiency of the evidence to support petitioner's convictions.

The court of appeals first rejected petitioner's argument that the indictment insufficiently alleged a demand for a "thing of value" because the "things" itemized in the indictment had no commercial or pecuniary value.[3] The court held that it was sufficient for the indictment to "simply track the statutory language" and for the government to allege that the defendant sought a "thing of value" without providing any detail. App. 3a-4a.

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[1] A motion to vacate the convictions pursuant to 28 U.S.C. § 2255 also was filed following sentencing, on June 24, 1993. That motion challenged the convictions based upon duplicity in the indictment and ineffective assistance of counsel. The § 2255 motion was denied by the district court, without hearing, on July 2, 1993, and a notice of appeal from this denial was filed with the Fourth Circuit on July 9, 1993. *See infra* note 2.

[2] Petitioner filed a motion for bond pending appeal that was denied on June 28, 1993. The appeal to the Fourth Circuit from the denial of bond pending appeal was consolidated with petitioner's appeal of the denial of his § 2255 motion. On August 16 and September 23, 1993, the Fourth Circuit issued orders granting petitioner bail pending appeal with certain conditions. In the decision below, the panel erroneously states that the September 23 order affirmed the denial of the § 2255 motion. App. 3a n.1; *see supra* note 1. In fact, the September 23, 1993, order only modified the conditions of petitioner's release pending appeal. There is no record of any Fourth Circuit order addressing petitioner's appeal from the denial of his § 2255 motion.

[3] The court described the three "things" demanded by Hirano as follows: (1) a "file" "concerning Mary and Larry Brett"; (2) "information regarding Mary Brett"; and (3) "Mary Brett's home address."

Turning to petitioner's argument that the evidence was insufficient to support the convictions, the court noted that the indictment alleged

> two distinct crimes: first, where one "pretends to be an officer or employee acting under authority of the United States . . . and acts as such," and second, where one "in such pretended character demands or obtains any money, paper, document, or thing of value." [Petitioner] contends that the government failed to prove that he had committed either of these offenses because at trial it failed to prove both the "acts as such" element of the first offense and the "demand" element of the second offense.

App. 4a. The court concluded that the evidence was sufficient to permit the trier of fact to determine that petitioner engaged in false impersonation of a federal officer by representing that he was a federal officer and "act[ing] as such." Having found that petitioner violated the first offense under Section 912 (*i.e.*, the prohibition on "act-[ing] as such"), the court stated that it "need not address" petitioner's challenge to the sufficiency of the evidence on whether petitioner had violated the second offense by demanding a "thing of value."

The panel stated that petitioner not only had represented himself as "an employee of various federal agencies but also [had] sought access to private information by virtue of his false authority." *Id.* at 5a. The court reasoned that such use of "false identities to gain access to private information amounted to an assertion of false authority and thus fulfills the 'acts as such' requirement of 18 U.S.C. § 912." *Id.* Because the court found "that the evidence adequately supports [petitioner's] conviction for the first offense prohibited by 18 U.S.C. § 912," *i.e.*, the "acts as such" offense, it refused to reach the issue whether "the information [petitioner] requested could . . . constitute a 'thing of value.'" *Id.* at 5a n.4.[4]

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[4] The court also "decline[d] to consider" the issue of duplicity in the indictment based upon its erroneous belief that it previously

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals perpetuates a longstanding conflict among the courts of appeals with respect to the elements of an offense under 18 U.S.C. § 912. In particular, there is a clear and direct conflict among the circuits on the issue of whether intent to defraud is an element of the offense under 18 U.S.C. § 912. Granting certiorari in this case would also permit the Court to resolve the existing conflict among the circuits on the question whether an indictment may charge both "distinct offenses" under Section 912 in a single count. Accordingly, this Court should grant certiorari to resolve the conflicts on these issues and to provide the necessary guidance in the interpretation of this federal criminal statute.

1. Petitioner's conviction was erroneously sustained because the government was not required to allege and prove an intent to defraud. There presently is a three-way split on this issue among the circuits, with the Fourth Circuit adopting the position, reflected in the decision below, that "intent to defraud" is not an element of the offense.

The false impersonation statute, in its current form, provides, in relevant part, that:

> Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States . . . and [either] acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be [liable for a felony offense].

18 U.S.C. § 912. Prior to 1948, the predecessor of Section 912 was codified at 18 U.S.C. § 76 (1946) and provided as follows:

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had addressed this issue in its September 23, 1993, order, denying relief under 28 U.S.C. § 2255. App. 3a n.1. In fact, the September 23, 1993, order only addresses petitioner's request for bail pending appeal. *See supra* notes 1-2.

> Whoever with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States, . . . and shall take upon himself to act as such, or shall in such pretended character demand or obtain from any person . . . any money paper document, or other valuable thing, [shall be liable for a felony offense].

In 1943, this Court in *United States* v. *Lepowitch*, 318 U.S. 702 (1943), held that the words "intent to defraud" mean that the defendant has "by artifice and deceit, sought to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct." *Id.* at 704.

In reliance upon *Lepowitch*, Congress, in its substantial recodification of the federal criminal code in 1948, deleted the "intent to defraud" clause from the false impersonation statute. The Revisor's Notes on the recodification explain that it was the position of the Congress that "[t]he words 'with the intent to defraud the United States or any person' . . . were omitted as meaningless in view of *United States* v. *Lapowich*, 318 U.S. 702 [sic]." Revisor's Notes, 18 U.S.C. § 912 (1988).[5] Since this revision of the statute, various courts of appeals have disagreed as to whether scienter—*i.e.*, intent to defraud—remains an element of the offense of "falsely assum[ing] or pretend[ing]" to be a federal officer or employee.

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[5] As Judge Alexander Holtzoff, who assisted in the Code's revision noted:

> In general, with few exceptions, the Code does not attempt to change existing law. Every provision has been brought down to date. The law has been rearranged and greatly simplified and modernized in phraseology.

Preface to Title 18 U.S.C.A., *quoted in Honea* v. *United States*, 344 F.2d 798, 801 n.5 (5th Cir. 1965). Nearly every one of Judge Holtzoff's observations are applicable to Section 912. *See id.; see also*, Revisor's Note, 18 U.S.C. § 912 (1988) ("Changes were made in phraseology").

The Fifth Circuit has held that the deletion of the intent to defraud language in the "structural recodification" of the statute did not change the substantive elements of the offense. *Honea* v. *United States*, 344 F.2d 798, 803 (5th Cir. 1965). Thus, "[a]n intent to defraud or an intent to wrongfully deprive another of property" remained an essential element of a Section 912 offense. *Id.* at 802-03; see also *United States* v. *Randolph*, 460 F.2d 367, 370 (5th Cir. 1972) (finding that the *Lepowitch* Court "did not hold that an allegation of intent to defraud was unnecessary, but instead defined the nature of the 'fraud' required"). Accord *United States* v. *Pollard*, 486 F.2d 190, 191 (5th Cir. 1973) (holding that intent to defraud is a necessary element of both offenses under section 912). The Tenth Circuit has suggested that it would adopt a similar reading of the statute. See *Dickson* v. *United States*, 182 F.2d 131, 132 (10th Cir. 1950) ("[t]here must be the false representation of being an officer with intent to defraud, and some overt act in keeping with the false pretense"). This interpretation is consistent with congressional intent and the legislative history of section 912.[6]

Furthermore, the Fifth Circuit's interpretation of section 912 is consistent with the rule of lenity. This Court has long recognized "that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally* v. *United States*, 483 U.S. 350, 359-60 (1987). This principle, known as the rule of lenity, is founded on the

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[6] The legislative history indicates that although significant revisions were made to the penal code in 1948, "[t]he original intent of Congress is preserved." S. Rep. No. 1620, 80th Cong., 2d Sess. 1 (1948). This Court often has noted that the 1948 recodification of the criminal code was not intended to make substantive changes in the law unless that intent was made clear by Congress. *See, e.g., Muniz* v. *Hoffman*, 422 U.S. 454, 467-74 (1975); *United States* v. *Cook*, 384 U.S. 257, 260 (1966).

belief that "before a man can be punished as a criminal under the federal law his case must be plainly and unmistakably within the provisions of some statute." *United States* v. *Gradwell*, 243 U.S. 476, 485 (1917) (internal quotation omitted). Thus, where the petitioner's interpretation of an ambiguous statute "is a securely plausible reading of the statutory language," this Court "will apply the rule of lenity and resolve the ambiguity in the [petitioner's] favor." *United States* v. *Granderson*, 114 S. Ct. 1259, 1269 (1994).

The courts of appeals in the District of Columbia, Third, Eighth and Eleventh circuits have held that while "intent to defraud" need not be specifically alleged as a separate element of a Section 912 indictment, intent to defraud nevertheless remains an element of the crime of false impersonation. *United States* v. *Gayle*, 967 F.2d 483 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1402 (1993); *United States* v. *Wilkes*, 732 F.2d 1154 (3d Cir.), *cert. denied*, 469 U.S. 964 (1984); *United States* v. *Robbins*, 613 F.2d 688 (8th Cir. 1979); *United States* v. *Rosser*, 528 F.2d 652 (D.C. Cir. 1976). However, these circuits apply a presumption that the scienter requirement is satisfied by proof that defendant undertook one of the two forms of conduct prohibited by statute. See *Gayle*, 967 F.2d at 486 ("Congress determined that 'intent to defraud,' as defined in *Lepowitch*, is automatically present any time the other elements of the offense (*i.e.*, [1] acting as such or [2] obtaining something of value) are proven").

The Second, Fourth, Seventh and Ninth Circuits take a contrary position, holding that the deletion of the "intent to defraud" language from the statute completely removed scienter as a necessary element of the offense. *United States* v. *Cord*, 654 F.2d 490 (7th Cir. 1981); *United States* v. *Rose*, 500 F.2d 12 (2d Cir. 1974), *vacated on other grounds*, 422 U.S. 1031 (1975); *United States* v. *Mitman*, 459 F.2d 451 (9th Cir.), *cert. denied*, 409 U.S. 863 (1972). The holding of the Fourth Circuit

in *United States* v. *Guthrie*, 387 F.2d 569 (4th Cir. 1967), is illustrative of this position:

> It cannot be assumed in these circumstances that Congress deleted an element theretofore regarded as essential without intending to affect the meaning of the statute . . . . We hold, therefore, that 'intent to defraud' is no longer an element of a charge under . . . [Section] 912.

Id. at 571. These circuits have adopted the position that "the injury to the federal government is occasioned by masquerading and acting as a government official regardless of fraudulent intent." *Id.*

Given these conflicting interpretations of the elements of the offense under Section 912, prosecutions under this statute—like the conviction at issue here—are contrary to the fundamental principal that "[c]riminal culpability for violation of federal statutes should turn on uniform law, not geography." *Wilkes* v. *United States*, 469 U.S. 964, 965 (1984) (White, J., dissenting from the denial of certiorari). There is a clear conflict among the circuits that warrants this Court's intervention and therefore, a writ of certiorari should issue to permit this Court to determine whether intent to defraud is an essential element of a Section 912 violation.

2. Petitioner was charged in each count of his indictment with both "distinct offenses" under Section 912. App. 4a. Under Rule 8(a) of the Federal Rules of Criminal Procedure, if a defendant is charged with two or more distinct offenses in an indictment, each offense must be set forth in a separate court. See generally 1 Charles A. Wright, Federal Practice and Procedure § 142 (2d ed. 1982).[7] Due to the duplicity in his indictment,

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[7] The prohibition against duplicitous indictments derives from at least four concerns. *See generally United States* v. *Cooper*, 966 F.2d 936, 939 n.3 (5th Cir.), *cert. denied*, 113 S. Ct. 481 (1992). First, such indictments fail to give a defendant adequate notice of the nature of the charges against him so that he can prepare his

petitioner was prejudiced in his trial preparation and his ability to present his defense at trial.

Section 912 of Title 18 defines two separate and distinct offenses. App. 4a; *United States* v. *Aguilar*, 756 F.2d 1418, 1420 (9th Cir. 1985); *United States* v. *Leggett*, 312 F.2d 566, 569 (4th Cir. 1962). These offenses are: (1) the impersonation of a federal officer coupled with an overt act in conformity with the impersonation; and (2) the impersonation of a federal officer coupled with the demand for a paper, document or thing of value. *United States* v. *Rippee*, 961 F.2d 677, 678 (7th Cir. 1992); *Aguilar*, 756 F.2d at 1420. Because of the way the statute is set out, the government often charges in the conjunctive, alleging both crimes in a single count of the indictment.[8]

Two circuits have held that an indictment that combines the two offenses of Section 912 into one count is duplicitous. *Leggett*, 312 F.2d at 568-70; *Aguilar*, 756

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defense. *United States* v. *Kimberlin*, 781 F.2d 1247 (7th Cir. 1985), *cert. denied*, 479 U.S. 938 (1986). Second, duplicitous counts impinge on a defendant's Sixth Amendment right to know the charges against him, since a conviction on a duplicitous count could be obtained by way of a non-unanimous jury verdict as to each offense contained within the count. *United States v. UCO Oil Co.*, 546 F.2d 833, 835 (9th Cir. 1976). Third, a duplicitous count can undermine a defendant's Fifth Amendment protection against double jeopardy as the lack of clarity may result in a subsequent prosecution. *United States* v. *Margiotta*, 646 F.2d 729, 733 (2d Cir. 1981). Fourth, a defendant may be prejudiced at evidentiary hearings. *United States* v. *Duncan*, 850 F.2d 1104, 1109 (6th Cir. 1988).

[8] Petitioner's indictment took the following form for each of the three counts:

> Michael Hirano did knowingly, willfully, and unlawfully falsely assume and pretend to be an officer and employee acting under the authority of the United States and a department and agency thereof, to wit [agency name], and act as such, and in such pretended character demanded papers, documents, and a thing of value, to wit: [item sought by petitioner].

F.2d at 1421. These holdings are in direct conflict with the Seventh Circuit, which in *United States* v. *Kimberlin*, 781 F.2d 1247 (7th Cir. 1985), *cert. denied*, 479 U.S. 938 (1986), held that such "duplicity . . . is of a technical semantic nature." *Kimberlin*, 781 F.2d at 1251. In fact, the Seventh Circuit has questioned whether charging both "separate offenses" in a single count truly is duplicitous: "[w]e have difficulty in seeing how an impersonator can demand or obtain (offense 2) without simultaneously acting (offense 1)." *Id.*

In this case, the court below refused to address this issue based upon the erroneous assertion that the issue previously had been addressed in a prior order. App. 3a n.1. Thus, the court reasoned that "[t]o sustain a guilty verdict as to each of the three counts in the indictment, the government had to adduce enough evidence to prove that [petitioner] violated only one of the two offenses charged in each count of the indictment." *Id.*[9] In essence, the government was permitted to charge both offenses in each count of the indictment and then, at trial, prove whichever one it chose.[10] This Court should grant certiorari to resolve the conflict in the circuits as to whether such an indictment under Section 912 is duplicitous and therefore violates petitioner's rights under the Fifth Amendment.

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[9] In fact, the government indicated during trial that it viewed Section 912 as defining a single offense which could be committed by the impersonator by either acting as a federal officer or making a demand of a paper, document or thing of value. App. 11a.

[10] As discussed above, the rule of lenity operates to resolve any ambiguity in favor of the petitioner. Where a statute's ambiguity leads to the government charging separate offenses in a single count, the rule "prescribes that doubt . . . be resolved against turning a single transaction into multiple offenses . . . ." *United States* v. *Duncan*, 850 F.2d 1104, 1109 n.4 (6th Cir. 1988) (citing *Bell* v. *United States*, 349 U.S. 81, 83-84 (1955)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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